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**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

EDWARD KONIK AND WILLIAM MALIN, individually, and on behalf of others similarly situated,

Plaintiffs,

vs.

TIME WARNER CABLE, and DOES 1 through 100, inclusive,

Defendants.

CASE NO: **CV07-0763- SVW (RZx)**

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT TIME WARNER CABLE'S MOTION FOR SUMMARY JUDGMENT RE STANDING**

Date: February 8, 2010
Time: 1:30 p.m.
Crtrm: 6

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# I

# INTRODUCTION

As the Court held in its Order of December 2, 2009, there is a triable issue concerning Plaintiff's reliance on Time Warner Cable ("TWC")'s advertised promises that if they stayed with TWC after its acquisition of the Adelphia cable television franchise Plaintiff would have the same programming at equal or less cost, without service interruptions and without the need for new equipment.

TWC now claims that Plaintiffs have no standing in that they cannot show actual harm prior to the time that they learned TWC's promises were false. In fact, even under the standard that limits their damages to harm suffered prior to learning that the promises were false, Plaintiffs suffered injury in fact.

Contrary to TWC's assertions, Plaintiffs did not learn of the falsity of TWC's promises from the mailing that TWC purportedly sent out in September, 2006. Both Plaintiffs learned that they would need higher-priced digital service and new equipment to receive channels which they had previously received with analog service only when they watched their televisions, were unable to receive an analog feed of those channels, and thereafter discovered from TWC that new equipment and different service packages would be required if they wanted to continue to receive those channels.

Plaintiffs paid for channels that they could not receive before they discovered that they were not getting those channels. This went on for approximately a month in the case of Mr. Konik and for over six weeks in the case of Mr. Malin. Similarly, Plaintiffs only learned of service interruptions when those interruptions occurred, not from TWC's mailed Subscriber Agreement, which neither of them recalls getting or ever having read.

In addition, Plaintiffs believe that their injuries should not be limited to the period between when the channels were switched to digital and the time they learned that those channels had been switched.

Under California's Unfair Competition Law ("UCL," Cal Bus. and Professions Code §§ 17200 et seq.) and False Advertising Law ("FAL," Cal Bus. and Professions Code §§ 17500 et seq.) fraud is assessed differently than it is under a common law fraud claim. The focus is on the defendant's conduct, rather than the plaintiff's damages, in order to effectuate a policy of protecting the general public against unscrupulous business practices and restitution serves the purpose not merely of making the plaintiff whole or forcing the offender to disgorge ill-gotten gains, but of deterring the offender from future violations.

This is surely a case that calls out for the expansive penalties of the consumer protection statutes. TWC not only made false promises, but kept the ads making those promises on its internet website long after they knew that their customers would not continue to receive the same programming for the same cost. [GI 51, and see Order, p. 5, fn. 3.]

Plaintiffs therefore request that TWC's motion be denied and the measure of damages not be restricted by the precedent of common law fraud jurisprudence.

## II

## THE STANDING REQUIREMENTS IMPOSED AFTER PROPOSITION 64 HAVRE NOT CHANGES THE LARGER INTENT OF THE CONSUMER PROTECTION STATUTES TO PROTECT THE GENERAL PUBLIC AND DETER FUTURE MISCONDUCT BY DEFENDANTS

The matter of damages, as the Court noted, was not raised by TWC in its motion for summary judgment. (Order, 52:1-3) Necessarily therefore, the issue of reliance in conjunction with injury in fact was not briefed. The court suggested that reliance in the context of a plaintiff's "ongoing or continuous decision to act or refrain from acting, which is based at least in part on defendant's alleged representations" and case law interpreting any differing conceptions of harm between the UCL, FAL and CRLA be addressed. (Order, 53:5-8.)

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Relying on precedent established in common law fraud cases, this Court took the position that

> TWC cannot be held liable for any damages resulting from Plaintiffs' decision to remain TWC subscribers after the time they learned the truth about the price changes, channel line-up and service interruptions.

(Order, 51:19-21.) However, as the Court noted, in all those cases where the plaintiffs' knowledge of the falsity of defendants' representations defeated their claims of reliance on those representations, that knowledge had been gained *before* the plaintiffs entered into the allegedly fraudulent transactions. (*Buckland v. Threshold Enters., Ltd.* 155 Cal.App.4th 768, 808-809 (2008); *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 668-669 (1993).)

The instant action is distinguishable from the cases cited in the Court's Order in that Plaintiff herein did not learn of the false representations until *after* they had agreed to become TWC customers. The Court has adopted what might be termed an ongoing reliance obligation, whereby Plaintiffs are required either to terminate their subscription or abandon any claim for damages at any time after they entered into a transaction with TWC if they learn that TWC's representations were false, because reliance is no longer justified once they learned that they were deceived. Under this approach, the discovery of the deception effectively redounds to the benefit of the deceiver, forcing the Plaintiffs either to terminate service entirely or acquiesce by accepting less than the advertisements promised without hope of compensation.

TWC has little or no incentive to make honest representations: if deception goes undiscovered, there is no complaint; if it is discovered, liability ends at the point of discovery. As TWC essentially argues in its motion, it is free to advertise falsely to attract customers so long as it gives sufficient "notice" some time prior to reneging on the advertised promises that initially attracted those customers.

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**A. The UCL Anti-fraud Provisions Serve a Larger Public Policy Purpose than Common Law Fraud and Focus on the Defendant's Conduct Rather than the Plaintiff's Damages**

Notwithstanding whatever suitability the approach outlined in the previous section might have in relation to common law fraud claims, it does not appear consistent with the history and intent of the UCL, which is designed to enforce public policies favoring fair business practices and consumer protection:

> The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud.... [T]he UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.

(*In Re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009), internal quotes and citation omitted.) Moreover, the procedural requirements imposed by Proposition 64

> left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted.

(*Id*., at p. 314.)

In short, the reliance and injury in fact requirements imposed by Proposition 64 must be construed in a manner that is consistent with the UCL's "larger purpose" to discourage "unscrupulous business practices."

Historically, the types of advertising actionable under the UCL and the FAL include ads that set up "bait-and-switch" schemes in which the customer is lured in with an ad offering a good deal or specific services and then induced to accept something different. This practice is also prohibited under express provisions the CRLA: Civil Code § 1770, subd. (a)(9) prohibits "advertising goods and services

with intent not to sell them as advertised," while subd. (a)(17) prohibits bait-and-switch rebate offers. (*See Pollard v. Ericsson, Inc.* 125 Cal.App. 4th 214, 221 (2004).)

This issue was addressed in *California Assoc. of Dispensing Opticians v. Pearle Vision Center*, 143 Cal.App.3d 419 (1983), in which the defendant advertised, but did not actually offer, "full eye care." (*Id*., at p. 433.) Specifically, defendant Pearle was not licensed to perform eye exams and the phrase "full eye care" implied that those services. (*Id*., at p. 424.) Pearle argued that the "misleading nature of the ad was cured when customers called for appointments, because they were then informed that Pearle did not, in fact perform eye exams." (*Ibid*.)

Pearle, that is, adopted a position essentially identical to that which TWC has taken in the instant action: subsequent information that shows its ads were misleading excuses the falsity. This argument is, however, clearly subversive of the intent of the consumer protection intent of the UCL and the court rejected it, holding that it "simply does not answer the charge that the advertisement itself is misleading. Such a tactic is akin to the 'bait and switch' technique," and upholding liability under the UCL and FLA, inter alia. (*California Assoc. of Dispensing Opticians*, 143 Cal.App.3d at p. 24.)[1]

Put another way, reliance in these cases is assessed as of the time the false advertising induces the customer to initiate action that ultimately results in harm to him, not at a later point when the customer enters into the substituted transaction that establishes the falsity of the ad and was made possible by the false ad. The

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[1]The District Court that decided *Laster v. T-Mobile USA*, *Inc*., 2009 U.S. Dist. LEXIS 116228 (S.D. Cal.), a case relied upon by TWC, concluded in an earlier ruling that the plaintiffs could proceed on a bait-and-switch theory. (*Laster v. T-Mobile USA*, *Inc*., 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005).) That court's subsequent conclusion that a plaintiff's acceptance of the "switch" deal "rebuts the presumption of reliance" is logically inconsistent with the right to proceed under a bait-and-switch theory. ( 2009 U.S. Dist. LEXIS 116228 at p. *21.)

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deceptive advertiser is held liable for the harm that is consequential to his ad, that harm being the difference in value between what was advertised and what was ultimately delivered.

The bait-and-switch cases are relevant to the reliance/injury-in-fact issue because in such cases the injured parties necessarily know that the advertised deals or services are false when they accept the proffered alternative, but the false advertising nevertheless remains actionable. The consumer is not put in the position of either walking away entirely or accepting the "switch" without hope of legal recourse. Rather, consistent with the legislative intent to protect him and deter unscrupulous practices, the consumer is allowed to accept the proffered alternative and to be compensated to the extent that the alternative is less favorable than what was advertised.

The instant case is no different. TWC induced Plaintiffs to accept it as their cable service provider with the bait of advertised promises regarding price, channel line-ups, equipment requirements and service quality; TWC subsequently switched its channel line-ups and pricing, caused a need for new equipment, and provided lesser quality service, all to the detriment of Plaintiffs. In many respects the switch was more insidious than that in the typical retail bait-and-switch because Plaintiffs did not even have to affirmatively assent to it: TWC simply changed and diminished the services while billing as though nothing had changed. Under these circumstances, it is unclear why, given the intent of and precedents established under California's consumer protection legislation, Plaintiffs should be forced into the Hobson's choice of no service or service with diminished value. Traditionally, TWC should be liable to Plaintiffs for restitution of the difference in value between what was promised and what was delivered. Proposition 64 does not compel any change in approach. (*In Re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 314.)

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**B. The UCL and FAL Impose a More Expansive Calculation of Damages than the CLRA, Reflecting an Intent to Deter Future Violations**

The amount of restitution available under the CLRA is straightforward: compensation for actual loss and is a legal remedy. (*Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 695-696 (2006).) The standard for assessing damages under the UCL and FAL is equitable and more expansive because, under these statutes, "the remedy of restitution serves two purposes – returning to the plaintiff monies in which he or she has an interest and deterring the offender from future violations." (*Ibid.*) Consequently, "the court has "broad authority' under unfair competition law to fashion a remedy to deter defendant from engaging in future unfair trade practices." (*Ibid.*, citing *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 450 (1979).) When damages are sought under both standards in the same action, the measure of compensation under the CLRA does not limit the compensation available under the UCL and the FAL. (*Colgan*, at p. 696.)

Looked at under either standard, Plaintiffs continue to suffer damage and injury in fact as a result of TWC's advertisements because initially they paid the same for less and, after getting the "switched" services, paid more for the same, including the added monthly charge for a digital converter box. On the other side of the same coin, TWC continues to profit from its false advertising for as long as plaintiffs pay a increased fees to get the same service they had when TWC promised in its ads that the service and equipment and prices would remain the same.

Under the CRLA, then, reflecting the statutory intent of consumer protection, and even more so under the UCL and FAL, reflecting the added intent of deterrence, the measure of restitution should consider the difference between what it would have cost Plaintiffs if the advertising had been true, and the increased cost to them of getting the same service after TWC changed the line-ups, pricing and equipment requirements, including the $4.50 to $6.90 per month cost of the digital converter box and the increased monthly cost in moving from the analog basic to a digital tier

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required to get the programs previously available on analog. [GI 52]

The standard suggested by the Court seems even more problematic with regard to interruptions in service because once the first interruption in service occurs, the customer is necessarily aware that the promise that there would be no interruptions in service is false. At that point he is required either to end service entirely or accept service with interruptions – and without statutory recourse under the UCL, FAL or CLRA because he cannot rely on the advertising after the first interruption. And, any claim for restitution based on a single, initial interruption is subject to the argument that the interruption is de minimis and doesn't merit damages – an argument that TWC raises in the instant motion. (Defendant's P&A, p. 17, fn. 5.) The legal consequences for the false advertiser are so limited that there is no incentive to tell the truth and therefore no deterrence. This approach is not consistent with the intent of the consumer protection legislation.

## III

## TWC HAS FAILED TO ESTABLISH THE ABSENCE OF TRIABLE ISSUES OF MATERIAL FACT REGARDING PLAINTIFFS' STANDING

Even under the common-law based standard set out in the Court's Order, i.e., that Plaintiffs' reliance on TWC's statements and TWC's liability terminated once Plaintiffs knew those statements to be untrue (unless there is a showing that Plaintiffs were unable to end service), TWC has not met its burden to establish the absence of a genuine issue of material fact.

The gist of TWC's argument is that Plaintiffs were put "on notice" that its advertised statements were false (and thus couldn't have relied on those false statements) by information purportedly mailed to Plaintiffs before the occurrence of any events that confirmed the falsity of the advertised claims. (Defendant's P&A, 11:21-12:2.)

Specifically, TWC argues first that Plaintiffs "knew" in advance, via letters and

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accompanying pamphlets purportedly mailed in September, 2006, about the changes in price, channel line-up and equipment needs that occurred (to Plaintiff's financial detriment) in October and November, 2006. (Defendant's P&A, 12:17-13:18.) The second part of TWC's argument is that the TWC subscriber Agreement, allegedly mailed to Plaintiffs in August, 2006, not only alerted Plaintiffs that TWC's advertised promise of no interruptions in service was false but also limits TWC's liability for interruptions that did occur. (Defendant's P&A, 15:7-17:11.)

In essence, TWC argues that since it sent out representations in its mailings that contradicted the representations made in its advertisements, Plaintiffs must have known that the representations in the advertisements were false and those in the mailings were true. However, TWC fails to explain just how Plaintiffs could have known which of two contradictory representations was true and which was false simply by comparing the two. It should be recalled in this context that the advertisements upon which Plaintiffs relied continued to run on TWC's web site during (and long after) the August and September mailings of the contradictory information. (Order, p. 5, fn. 3.) TWC was simultaneously making contradictory representations. Obviously, the contradictory representations themselves furnished Plaintiffs no logical or empirical basis from which to conclude that one representation was false and the other true. Only the occurrence of external events – the actual changes in programming, price and equipment needs, and the interruption of service – could have afforded Plaintiffs real knowledge with which to assess the falsity of TWC's advertisements.

Moreover, TWC does not support its argument with any evidence that the contradictory information was read or understood by Plaintiffs or that it influenced their perception of the truth of TWC's advertisements. TWC merely proceeds on the unexplained assumption that the "notice" allegedly given to Plaintiffs by the mailings automatically equates to Plaintiffs' "knowledge."

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**A. Plaintiffs' Reliance on TWC's Representations Can Only Be Negated by a Showing That They Knew, Suspected or Believed That Those Representations Were False**

The two cases cited in the Court's Order, *Buckland v. Threshold Enters.*, *supra*, and *Caro v. Procter & Gamble Co.*, *supra*, held that there could be no reliance where the plaintiff "suspected" that the defendant's representations were untrue (*Buckland*, 155 Cal.App.4th at p. 808-809) or "did not believe" the representations to be true (*Caro*, 18 Cal.App.4th at p. 668). Similarly in *Laster v. T-Mobile USA, Inc.*, *supra*, 2009 U.S. Dist. LEXIS 116228 (S.D. Cal.), a case cited by TWC, the court speculates that there would be no reliance had the plaintiff acted "with knowledge" that defendant's representations were false. (*Id.*, at p. *21.) As the *Buckland* court explained, "actual reliance occurs only when the plaintiff reposes confidence in the *truth* of the relevant representation, and acts upon this confidence (*Id.*, at p. 808, emphasis retained, relying on *Restatement (Second) of Torts*, §§546, 548.)

Under this standard, Plaintiffs' reliance on TWC's misrepresentations can only be negated by a showing that they "knew," "suspected" or "believed" that those misrepresentations were in fact false. This is necessarily a subjective standard, dependant on evidence of the Plaintiffs' actual state of mind when they took action in response to TWC's representations.

TWC has adduced no evidence establishing when Plaintiffs actually "knew," "suspected" or "believed" that TWC's representations regarding price, channel line-up and equipment or service interruptions. Even assuming, for the sake of argument, that TWC has furnished sufficient evidence to support its claims that Plaintiffs "received" the information allegedly mailed to them, TWC has failed to show that Plaintiffs' actual reliance – that is, their knowledge or belief about the truth of TWC's representations – was in any way affected by that information.

In failing to bring forth such evidence, TWC has failed to meet its threshold

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burden of establishing the absence of a genuine issue of material fact. Indeed, as indicated below, the evidence clearly establishes that TWC's contradictory mailings did not inform Plaintiffs that they could not rely upon TWC's advertised promises.

**B. Plaintiffs Did Not Learn about TWC's Price, Channel Line-up and Equipment Changes until They Experienced the Effects of TWC's False Promises**

TWC asserts that Plaintiffs were "on notice" as a result of its mailings and simply equates this notice with Plaintiff's having "learned the truth" about its advertisements (Defendant's P&A, 11:24-28.) TWC cites evidence – GI 5, 12, 16, 18 – that purportedly supports the "notice," but none to support the claim that Plaintiffs "learned the truth." TWC further asserts that "[at] the time Plaintiffs received this letter and enclosed pamphlet. . . Plaintiffs knew the truth regarding any changes to pricing and channel lineups." (*Id*., 13:10-12.) Again, the evidence adduced in support of this assertion – DUF 12-16, 45[2] – does not support the claim that "Plaintiffs knew the truth." TWC has simply failed to meet its initial burden of showing that there is no triable issue of material fact concerning Plaintiffs' reliance.

This alone is sufficient cause to deny TWC's motion, but, in addition, there is ample evidence, deliberately suppressed by TWC, that neither of the Plaintiffs learned anything affecting their knowledge or beliefs about the representations upon which they relied from the purported September mailings.

Plaintiff Konik, for example, testified that the "Important Price and Programming Changes" pamphlet did not inform him that the Turner Classic Movies channel had been dropped from his programming; rather, only when the matter was

[2]DUF 45 states that Plaintiffs had "full knowledge" of channel, equipment and price, but the evidence cited in support does not show that Plaintiffs possessed any such knowledge. *See* Plaintiff's Statement of genuine Issues, No. 45.

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brought to his attention by his wife did he become aware that the channel line-up had been changed. [GI 61]

In addition, Konik testified that he complained to a Sharon Parker of TWC that he could not make sense of the line-up information sent to him by TWC: the list of available "tiers" of programming was not consistent with the channel list:

> There were selection of tiers you could have. Except when you went to the channel lineup, it didn't say anything about these tiers. So you could not tell what tiers were available, or what channels were available in each tier.

[GI 62, 63]

The relevant question is whether Plaintiffs became aware of changes in the price channel line-ups and equipment requirements before they paid for the reduced services brought about by those changes.

1. Plaintiff Konik

The channel line-up in Mr. Konik's service sector changed on November 14, 2006. [GI 16] There is no evidence that he had any personal knowledge prior to that date of any changes that would affect his reliance on TWC's representations.

TWC asserts that it mailed a letter and a pamphlet entitled "Important Price and Programming Changes" to Mr. Konik on September 24, 2006. TWC's only evidence of this mailing is the hearsay statements of Deborah Picciolo and business documents that show only that mailings were requested. [GI 11, 16] The court rejected similar incompetent evidence submitted in support of TWC's first MSJ regarding the alleged mailing of TWC's Subscriber Agreement. (Order, p. 16, fn. 6.)

Mr. Konik himself could not recall receiving any letters regarding line-up information, but did receive a

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> glossy multi-page pamphlet with the tier discussion in it and the second thing was the channel lineup sheet, which . . . did not agree in terminology with the tier lineup. So you could not tell what channels were in what tiers from the channel lineup sheet.

[GI 62]

On November 11, 2006, Mr. Konik called TWC to complain about the incomprehensible line-up information and was told that he had probably been sent the wrong information and to check on line. [GI 63] The online information was identical to the incomprehensible pamphlet he had received. [GI 64] Approximately two months later, Mr. Konik received the same lineup information in a second mailing. [GI 65] Thus, the "information" that allegedly clued Mr. Konik in as to the falsity of TWC's advertising was incomprehensible to him.

On December 12, 2006, Mr. Konik received a phone call from Ms. Parker, as noted above, at which time he complained that Turner Classic movies had been dropped from his service and that the tier and channel information supplied by TWC was incomprehensible. Ms. Parker explained the new pricing system and asked him if he wanted to change over to "the new lineup;" he said he would wait until March. At this point, Mr. Konik became aware that he would have to pay more to continue to receive programming he had been receiving. [GI 66]

Mr. Konik's testimony evidences that he was not aware that TWC's advertised representations concerning price, line-up and equipment had been untrue until December 12, 2006 at the earliest. By this date, he had undoubtedly suffered injury in fact and lost money as required by Cal. Bus. & Prof. Code § 17204 and the damage required by Cal Civil Code § 1780(a) because, for approximately a month, he was, unbeknownst to him, getting fewer channels for the same monthly payment he had made before the channel line-up was changed.

The chronology is as follows:

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Mr. Konik's bill for service from 10/25/06 to 11/24/06 was due on November 7, 2006. (TWC Exh. E, p. 51.) Payment was received October 30, 2006. (*Id*., at p. 54.)

Mr. Konik's bill for 11/25/06 to 12/24/06 was due on December 8, 2006 (*Id*., at p. 53.) It was received on December 4, 2006. (*Id*., at p. 56.)

The line-up change went into effect on November 14, 2006. [GI 16] TWC concedes that Mr. Konik's bill was not reduced. In fact, his December bill went up 5 cents. [GI 9]

For one month, from mid-November to mid-December, Mr. Konik was charged by TWC for channels that he could not receive before he became aware on December 12, 2006 that TWC's promises about price, programming and equipment requirements were untrue. This is injury in fact.

2. Plaintiff Malin

As with Mr. Konik, TWC furnishes no evidence to show that the information it claims to have mailed in September, 2006 altered Mr. Malin's reliance on TWC's advertised representations about price, programming and equipment requirements.

TWC asserts that the information was sent to Mr. Malin "on or about" September 22, 2006. [GI 11, 12] As noted above, no competent evidence supports the mailing. Yet, even if Mr. Malin had received the pamphlet, he could not recall in what form, whether it came via mail, or when it came – and, in any event, did not recall reviewing it. [GI 43] There is thus no evidence that Mr. Malin learned anything relevant to his reliance on TWC's advertisements from TWC's claimed September mailings.

Mr. Malin learned that he no longer received channels he had previously gotten not from TWC's mailings, but when he attempted to watch it on a TV without a digital converter box and was unable to receive it. [GI 57]

Prior to this time, he had been told over the phone by a TWC representative that his prices would go down and that the channels would be rearranged

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> into some kind of subjects or groups that was going to make more sense out of the lineup. And it didn't turn out that way because the channels that were available to me without a digital box, channels that I really enjoyed, were not, some of them were not.
> So I got a box. So my rates didn't go down.

[GI 58, 59]

Like Mr. Konik, Mr. Malin only became aware that certain channels would be dropped from the analog tier and that he would have to pay more and get a digital converter box to receive those channels when his television set no longer received those channels and inquiries to TWC revealed the truth of the matter.

Mr. Malin ordered the converter box on December 6, 2008 and it was installed on the following day His December 8, 2006 bill reflects a charge for a partial month's digital box rental from 12/07-12/17. [GI 60.]

There is thus no evidence that Mr. Malin was aware that he would lose channels he had already been getting, would have to order a digital converter box and would have to pay more to get those channels back prior to his December 6, 2006 conversation with TWC when her ordered the box.

The line-up change in Mr. Malin's service area went into effect on October 24, 2006. [GI 12] He knew by December 6, 2006 that TWC's advertising was false. [GI 60] Mr. Malin was therefore paying for services he did not receive for at least 6 weeks.

Mr. Malin's bill for service from 10/18/06 to 11/17/06 was due on October 30, 2006. [GI 1, (TWC Exh. F, p. 73.)]

Mr. Malin's Bill for Service from 11/18/06 to 12/17/06 was due November 30, 2006. (TWC Exh. F, p. 75.)

Payment for both bills was received on December 5, 2006. (TWC Exh. F, p.78

The payment for channels that could not be received between the October 24,

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2006 change to digital and December 6, 2006, when he finally became aware that TWC's advertised promises were false, constitute Mr. Malin's injury in fact.

**C. The Subscriber Agreement Did Not Affect Plaintiffs Reliance on TWC's Advertisements and by Law Cannot Limit TWC's Liability**

TWC advances four arguments in support of its motion on this issue. The first is basically a reprise of its argument concerning price and programming, i.e. that Plaintiffs "knew" the ads promising "no interruption of service" were false because a TWC mailing – the Subscriber Agreement this time – represented that there would be interruptions. (TWC P&A, 15:21-16:2.) This argument contains the same flaws as the price-and-programming argument because mailing is not established and there is no evidence that either Plaintiff was aware of the content of the Subscriber Agreement. [GI 32]

TWC's second argument is that any restitution for service interruptions is limited to that granted by the Subscriber Agreement or by TWC's "practice" of granting rebates when requested. This argument is an assertion that Plaintiffs have waived their right to recovery and is prohibited by the antiwaiver provision of the CRLA. (Cal. Civil Code § 1751.)

TWC's final two arguments are addressed only to Plaintiff Konik's service interruption.[3]

The first of the final two argues that the interruption to his service occasioned by a faulty converter box is unrelated to the transition from Adelphia to TWC. The last argument, alluded to above, is that the interruption is too insignificant to merit restitution. These arguments are meritless as set out below.

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[3]TWC does not dispute that Mr. Malin's service was interrupted.

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1. Plaintiffs didn't know that they would have service interruptions until their service was interrupted

TWC, as it did in its first motion for summary judgment, asserts that Plaintiffs were mailed a Subscriber Agreement in August, 2006. Once again, the claim is based on the declaration of Deborah Picciolo, who testified that the mailing was made by an outside "provider," CSG, located in Nebraska and that she only has second-hand knowledge that the Subscriber Agreement was ever mailed, on the basis of CSG's claims to have inserted the subscriber agreement in mail sent to Plaintiffs [GI 32] Once again, the TWC "internal business documents" cited as evidence that the Subscriber Agreement was mailed only establish that CSG was authorized to mail the document; not that it did. [GI 32] This time TWC seeks to remedy Ms. Picciolo's lack of personal knowledge by having her describe the LOAs in a little more detail (which still does not convert them from requests for mailing into proof that mailing occurred) and assert that nothing from CSG shows the mailings did not occur. [GI 32] Ms. Picciolo's assertion that she is aware of nothing that proves something didn't happen is hardly amounts to the personal knowledge required to show that she is "competent to testify to the matters stated," as required by F.R.C.P. Rule 56(e).

In addition, Mr. Malin testified that he couldn't recall receiving the Subscriber Agreement Malin Depo at 57:23-58:2, 203:19-204:20) and Mr. Konik testified that he never received it. Exh. 2 (Konik Depo., 199:13-22, 201:6-16.)

As with the information which TWC claims gave Plaintiffs knowledge of impending changes in channel line-up, pricing and equipment, TWC has adduced no evidence to show that any information contained in the Subscriber Agreement in any way affected Plaintiffs' perceptions about the truth of TWC's advertised promises that service would not be interrupted.

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2. The Subscriber Agreement Does Not Limit Plaintiffs' Statutory Protection Against False Advertising

Beyond the issue of "knowledge" TWC also argues that provisions of the Subscriber Agreement, as well as TWC's "practice," limit Plaintiffs' right to recovery. Thus, pursuant to the Subscriber Agreement, TWC says, Plaintiffs are only entitled to compensation if they suffer loss of all cable channels and internet service for more than 24 hours. TWC claims that Plaintiffs "bargained" for this and are stuck with it. (TWC P&A, 16:8-16.) TWC thus argues that Plaintiffs rights to restitution pursuant to statute are waived in favor of the compensation scheme included in TWC's adherence contract.

However, California Civil Code § 1751 provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." TWC cannot limit the restitution available to Plaintiffs under the CRLA by contract.

A fortiori, if Plaintiffs' statutory remedies cannot be circumscribed by TWC's Subscriber Agreement, they can't be circumscribed by an informal TWC practice of which there is no evidence that Plaintiffs were even aware.

3. The Transition from Adelphia to TWC Includes Digital Converter Boxes

TWC also argues that the interruption was unrelated to the transition from Adelphia to TWC because the interruption was caused by a malfunction of the digital computer box. This argument is based entirely on the conclusory assertion of Jose Leon, a TWC vice-president, that, because the malfunction of the box caused the interruption, it was "not the result of the switchover of subscribers from Adelphia to TWC."

Without expressly saying so, TWC is apparently now taking the position that the transition or "switchover" from Adelphia to TWC only involved the "cable signal" and somehow excluded the digital converter boxes through which the signal passes

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before it can be seen on the subscriber's television. The billing records indicate that TWC considers collection of the monthly rental fees for the digital boxes to be part of transition, so unless TWC is transmitting these fees to Adelphia, it is only TWC's responsibility for the functioning of the boxes that was miraculously left out of the deal.

Moreover, Ms. Picciolo, TWC's President and PMK, testified that "transition" involved "back office" issues, including "billing system integrations and those types of things," i.e., the transition was not limited to the cable signal until TWC needed an argument to escape responsibility for its false promise that there would be no service interruptions, a promise which was not limited to interruptions caused by the cable signal. [GI 8]

4. TWC Is Liable for All Interruptions in Service

Finally, TWC claims that Mr. Konik's interruption was not a "distinct and palpable cognizable injury" because it only lasted five minutes. This argument is meritless first because TWC's advertisements didn't say "only short interruptions" or "only interruptions of five minutes or less;" they promised " your service will *not* be interrupted." (Order, 30:12-14, 34:1-3.) An interruption, however short, makes the representation false.

Secondly, while five minutes may well be "equivalent to .000112 of the total time" in a 31 day billing period as TWC argues, it amounts to 25% of the typical 20 minutes of non-commercial viewing time in a 30 minute television program, a "distinct and palpable" hunk of time when your viewing has been interrupted.

Finally, as the Supreme Court reiterated in *In Re Tobacco II Cases*, *supra*, 46 Cal.4th 298, one of the purposes of class actions is to "make it economically feasible to sue when individual claims are too small to justify the expense of litigation," which serves an "important role in the enforcement of consumers' rights." (*Id*., at p. 313.)

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## IV

## CONCLUSION

For all of the above-stated reasons, Plaintiffs' respectfully request that defendant TWC's motion for summary judgment be denied.

Dated: January 25, 2010

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